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No. 92-1831

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

NORTHERN KENTUCKY WELFARE RIGHTS ASSOCIATION, and MICHELLE ASBURY - - - - - Petitioners

versus

BRERETON JONES, Governor of Kentucky - - - - - - - - Respondent

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COMMONWEALTH OF KENTUCKY
CABINET FOR HUMAN RESOURCES

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QUESTION PRESENTED

Does an annual application by a state for an allocation of funds under § 2605 of Title XXVI to the Low Income Energy Assistance Act (LIHEAA) of 1981, P.L. 97-35, as amended, 42 U.S.C. § 8624(b)(2), whereby a state participating in the LIHEAA grant program agrees to make payments to certain low income households only under the conditions specified therein, create any rights enforceable by members of those households under 42 U.S.C. § 1983, or create an implied private right of action by such members.

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MICHELLE ASBURY - - - - - - - - *Petitioners*

v.

BRERETON JONES, GOVERNOR OF KENTUCKY - *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Sixth Circuit, No. 92-5634 (January 19, 1993).

COUNTERSTATEMENT OF THE CASE

Respondent agrees with Petitioners' statement of the case, including the procedural history and the applicable statutes and regulations, except as follows. Petitioners' statement fails to state that *all* households with income less than 110 percent of the poverty level were eligible for crisis funds on a first come basis so long as such funds were available.

REASONS FOR DENYING THE WRIT

Petitioner asserts that there is a conflict between the decision of the Sixth Circuit in this case and certain decisions of other Circuits, as well as a conflict with the decision of the U.S. Supreme Court in *Suter* v. *Artist M.*, ___ U.S. ___, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992). On page ten of the petition it is stated:

> Both types of conflicts exist in this case and the rights of hundreds of thousands of people are affected. For example, in the Fiscal Year 1990 Kentucky Plan, 186,000 households with incomes below 110% of poverty were categorically excluded.

This statement is very misleading. No households with incomes below 110% of poverty were categorically excluded from the Kentucky Plan. All such households were eligible for crisis assistance. It is true that in 1983 the Eighth Circuit held that LIHEAA created a private right of action to enforce assurances made in a State Plan to the Secretary of the Department of Health and Human Services (HHS), and that the Fourth and Sixth Circuits have subsequently held that no such enforceable rights exist. However, any conflict between those Circuits as to that issue has been resolved by this Court.

On March 25, 1992, the United States Supreme Court resolved any conflict in legal theory on this issue with the decision of *Suter, supra.* In *Suter,* the Court considered the enforceability under § 1983 and by private right of action of certain requirements and assurances of State Plans under the Federal Adoption Assistance and Child Welfare Act ("the Act"). Section 671(a) of the Act requires as a condition for Federal funds that a participating State have a plan, approved by the Secretary. Such plan contains sixteen listed features.

The Court carefully considered the development of the doctrine of implied private rights of action to enforce Fed-

eral laws and rights enforceable under § 1983 from *Cort* v. *Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d (1975), to *Wilder* v. *Virginia Hospital Assn.*, 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990), including *Maine* v. *Theboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980), *Pennhurst* v. *State School and Hospital* v. *Halderman*, 451 U.S. 1, 101 S.Ct. 1531 67 L.Ed.2d 694 (1981), *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 107 S.Ct. 766, 98 L.Ed.2d 781 (1987) and *Golden State Transit Corp.* v. *Los Angeles*, 493 U.S. 103, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989). The Court held that no right enforceable under 42 U.S.C. § 1983 exists to enforce conditions on the grant of Federal funds to a state unless Congress confers such a right unambiguously in the Act. The Court further held that statutory provisions must be analyzed in detail, in light of the entire legislative enactment to determine whether the language of the Act clearly creates an enforceable right within the meaning of Section 1983. Moreover, the Court reaffirmed that there is no implied private right of action under a statute unless Congress intended to make a private remedy available to enforce the statute.

In *Cabinet for Human Resources* v. *Northern Kentucky Welfare Rights Association*, 954 F.2d 1179 (6th Cir. 1992) (LIHEAP II), the Sixth Circuit carefully analyzed the entire Act and concluded the Act did not provide a private right of action to enforce requirements of 42 U.S.C. § 8624. In LIHEAP II, LIHEAA did not satisfy any of the applicable *Cort* standards. The Court found that Congress did not intend to create a federal right of action and that it would be inconsistent with the underlying purpose of the legislative scheme to imply an original federal remedy.

In the instant case (LIHEAP I) the Sixth Circuit correctly applied the law as set forth in *Suter*. The analysis performed in LIHEAP II applies to this case as well. The

two cases involve the same Act, and both sections involve general directives to the State as a condition for receipt of federal funds. The provision at issue in this case, Section 8624(b), is a list of assurances a state is required to provide to the Secretary for Health and Human Services in order to receive funding. Like *Suter*, the parties agree that the State had a plan, that the plan contained the required assurances, and that the plan was approved by the Secretary.

Furthermore, like the Act analyzed in *Suter*, the section of LIHEAA at issue here does not impose any additional binding obligations on a participating state that are sufficiently specific and definite and intended to benefit these petitioners. LIHEAA does not provide more than vague and amorphous guidance to a state in carrying out its generalized duties under the statute, or to the Courts in enforcing them. LIHEAA does not remain unenforced, however, because a state's limited duties thereunder are enforced by the federal agency administering the grants, HHS.

Petitioner seeks to distinguish the *Suter* decision from the decision of the Sixth Circuit in LIHEAP II by reference to the language in *Stovell* v. *Ives*, 976 F.2d 65, 71 (1st Cir. 1992) In *Stovell* a distinction was made between a statutory provision which is a communication to a specific federal official whose approval is required prior to a state's receipt of federal funds and one which is a communication from Congress directly to states which elect to apply for earmarked funds. Petitioner asserts that LIHEAA (the Act) "imposes precise requirements on the states". Those precise requirements are that the state agrees to make payments only with respect to certain households and not to exclude any incomes under 110% of poverty. But these "requirements" are "assurances by the chief executive officer of the State" to the Federal Secretary of Health and Human Services.

The parallel between this case and *Suter* is even closer. As outlined above, the assurances do not constitute a precise method of calculating the amount each household will receive. Each state is free to design its own method; and this may or may not include a subsidy component. The assurances are very general in nature and the Act does not provide any specific benefits for any specified individuals. It is not an entitlement program. Like the Adoptive Assistance Act, LIHEAA provides general directions to states which prescribe the actual method of determining payments to be made.

The Court's language in *Suter, supra,* 112 S.Ct. at 1369, is clearly applicable to this case:

> (The Act) does not contain statutory guidance on how to measure reasonable efforts. The meaning will vary with the circumstances of each individual case. Regulations are not specific and do not provide notice to the states that failure to do anything other than submit a plan with the requested features, to be approved by the Secretary, is a further condition on the receipt of funds from the Federal Government.

The remedy provided by LIHEAA as well as the Act for a state's failure to follow its assurances to the Secretary is loss of federal funds. The Court has found such a remedy sufficient for enforcement of federal funding statutes.

CONCLUSION

The U.S. Supreme Court in *Suter* v. *Artist M., supra,* resolved the conflict over existence of enforceable rights and an implied private right of action based on assurances in a state plan approved by the federal Secretary. In the instant case, the Sixth Circuit has properly applied the principles of *Suter* and correctly found that the petitioners do not have an implied private right of action under 42 U.S.C. § 8624(b)(2) and that this section does not create

any right enforceable by petitioners under 42 U.S.C. § 1983. There is no just cause for a Writ of Certiorari to issue, and therefore, the petition should be denied.

Respectfully submitted,

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